IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 405 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THE PEERLESS GENREAL FINACE & INVESTMET CO. LTD.

Versus

ESSAR OIL LIMITED

Appearance:

1. COMPANY APPLICATION No. 405 of 2004

MR NAVIN K PAHWA for Applicant.

MR MIHIR J THAKORE WITH MR. S.N. SOPARKAR SENIOR ADVOCATES for Respondent No. 1

MR PRANAV G DESAI for Respondent No. 2,3,4.

MR MIHIR JOSHI, SENIOR ADVOCATE WITH MS MEGHA JANI for ICICI Bank Ltd.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 21/02/2005

ORAL JUDGEMENT

The applicant, namely, The Peerless General Finance & Investment Company Limited has taken out this Judge's Summons making following prayers :-

[A] That this Hon'ble Court be pleased to hold and declare that holding of meeting of the debenture holders holding more than 2000 debentures would not serve any fruitful purpose as more than one-fourth in value of debenture holders holding more than 2000 debentures are opposed to the Scheme of Arrangement / Compromise by the respondent, in the interest of justice and equity;

[B] That this Hon'ble Court be pleased to hold and declare that the meeting held on 26.10.2004 for consideration of the Scheme of Arrangement / Compromise proposed by the respondent concludes that the Scheme is defeated / has failed as the same is opposed by more than one-fourth in value of debenture holders holding more than 2000 debentures, in the interest of justice;

[C] That this Hon'ble Court be pleased to vacate the order dated 04.04.2003 made by this Hon'ble Court in Company Application No. 166 of 2003, in the interest of justice and equity;

2. This Court has permitted the applicant to join the Company, namely, Essar Oil Limited as respondent and notice was issued on 06.12.2004 making it returnable on 17.12.2004. This Court has passed further order on 29.12.2004 recording the submission of Mr. S.N. Soparkar, learned Senior advocate appearing for the respondent Company that without prejudice to the rights and contentions of the respective parties, a joint meeting would be held between the applicant and the respondent Company in presence of the debenture trustees somewhere in the second week of January, 2005, to explore the possibilities and to put an end to all disputes between the parties. The said statement was made on the basis of information that the meeting was being convened by the debenture trustees, where both the parties were invited.

3. This Court has passed further order on 02.02.2005 observing that the applicant along with others, namely, UTI Asset Management Company Private Limited, LIC Mutual Fund and G I C Asset Management Company Limited are holding 36.37% of the total holding of the debenture

holders. The Court has further recorded the statement of Mr. N.K. Pahwa, learned advocate appearing for the applicant that pursuant to the direction issued by this Court on 29.12.2004, a meeting was held for negotiation on 13.01.2005 to explore the possibility of settlement and to put to an end of all the disputes between the parties. However, no fruitful result was achieved in the said meeting. The Court has further recorded the statement of Mr. Pahwa that when the Court convened meeting was held on 23.12.2004, in that meeting, the applicant as well as above institutes have opposed the Scheme. Based on this statement and only with a view to ascertain the stand of the above institutes, the said institutes were permitted to be joined as parties in this application and notices were issued on them making it returnable on 11.02.2005. The Court has further recorded the statement of Mr. Soparkar to the effect that ICICI Bank Limited being one of the Term Lenders is also required to be heard in the matter as ultimately, the respondent Company would have to offer the better terms to the applicant on the basis of the stand which may be taken by ICICI Bank Limited and other Term Lenders. ICICI Bank Limited was also ordered to be joined as party and notice was issued on it making it returnable on 11.02.2005.

4. An affidavit is filed by Shri Patit Paban Ray, an authorised officer of the applicant Company in support of the Judge's Summons. An affidavit-in-reply is filed by Shri Sheikh S. Saffi, Company Secretary of the respondent Company. A further affidavit was filed by the said Shri Sheikh S. Saffi on 02.02.2005.

5. Mr. N.K. Pahwa, learned advocate appearing for the applicant has submitted that the respondent Company approached the applicant to invest in Optionally Fully Convertible Debentures (OFCDs) of face value of Rs. 190 consisting of three parts as follows :-

Part A	Rs. 40
Part B	Rs. 45
Part C	Rs.105

6. He has further submitted that the applicant agreed to invest in 26,50,000 OFCDs and paid full amount of Rs. 27,82,50,000/- on account of Part-C. The applicant was duly allotted 26,50,000 OFCDs and was also issued Debenture Certificates all dated 27.04.1996. The debenture Certificates issued to the applicant contained financial covenants and conditions. It was stipulated therein that the Company would pay interest @ 12.5% p.a.

semi-annually on June 30th and December 31st beginning from 21.04.1995 on the debentures upto December 20, 1997 on the paid up value of Part-C of the debentures outstanding from time to time. It was further stipulated that the first payment of interest would be for the period ending 31.12.1995. It was also stipulated that the debenture holders who did not opt to exercise the conversion option of Part-C of the debentures, interest would be paid @ 14% p.a. beginning for the period from December 21, 1997 till the date prior to redemption date. The said interest was to be paid also on June 30th and December 31st. The last payment of interest would be made along with the redemption amount of the debentures. The applicant has chosen not to opt to exercise the conversion option in respect of Part C of the debentures and therefore, the applicant was entitled to interest 12.5% p.a. from 21.04.1995 semi-annually and @ 14% p.a. from 21.12.1997 till the date prior to redemption date i.e. 20.04.2003. The Company neglected to pay any interest either on 31.12.1995 or at any point of time thereafter at the rate stipulated in the covenants. Several reminders and requests demanding payment of the due amount remained un-addressed. However, by a subsequent communication, the Company admitted that it has not been able to pay the interest amount and it promised to pay the interest amount.

7. Mr. Pahwa has further submitted that despite the assurance given by the Company when no payment was received, a notice was sent claiming an amount of Rs.11,23,59,684/- upto 31.12.2000 from the Company. Despite the receipt of the notice, the Company did not make payment to the applicant. The applicant was, therefore, constrained to file Civil Suit No. 434 of 2001 in the High Court at Calcutta under its original Civil Jurisdiction in August, 2001 praying for a decree for an amount of Rs.11,23,59,684/- from the respondent Company. In the said suit, on issuance of notice by the Court in notice of motion taken out by the applicant, the respondent Company has filed an affidavit before the Calcutta High Court wherein it was inter alia urged that the Company has formulated four Schemes of Arrangement / Compromise under Section 391 of the Companies Act, 1956 for settlement of dues of four categories of debenture holders of the Company. So far as the applicant is concerned, it was pointed out by the Company that the applicant is covered by 4th category of debenture holders which read as "holders of fully paid debentures holding more than 2000 debentures". It was further submitted by the Company that the Company has filed an application before this Court under Section 391 of the Companies Act,

1956 for convening meetings of the aforesaid four categories of debenture holders for considering and if thought fit, to approve the Scheme of Arrangement / Compromise. The Company also submitted that this Court by order dated 04.04.2003 made in Company Applications has directed holding of meeting of different category of debenture holders which were scheduled on 06.05.2003. The Company has also filed an application in this Court for stay of proceedings against the Company and this Court vide its order dated 07.04.2003 has granted such stay. So far as category No. 4 debentures holders is concerned, the Company has filed Company Application No. 171 of 2003. Since the Company was not permitting the applicant to proceed with the pending suit filed by the applicant for recovery of its dues from the Company, the applicant has filed Company Application No. 263 of 2004 in this Court praying for vacating / modifying the order dated 07.04.2003 passed by this Court in Company Application No. 171 of 2003. This Court vide its order dated 18.10.2004 permitted the applicant to proceed with the pending suit. However, it was directed that the decree that may be made in the suit shall not be executed until finalisation of the Scheme of Arrangement or until suitable orders are made by this Court in that behalf.

8. Mr. Pahwa has further submitted that pursuant to the directions issued by this Court by an order dated 04.04.2003 in Company Application No. 166 of 2003 meeting for debenture holders for considering the Scheme was to be convened on 06.05.2003. However, no decision was taken in the meeting so directed by the Court for more than a year. The Chairman of the Meeting thereafter issued an advertisement dated 01.08.2004 stating that the meeting of the debenture holders holding more than 2000 debentures was scheduled to be held on 26.10.2004. On 26.10.2004, when the meeting was held, all the four institutions / Companies have unanimously opposed the Scheme. The applicant as well as three other institutions have submitted written objections to the Scheme. He has further submitted that upon receiving the objections from these four institutions / Companies, it was obligatory on the part of the Chairman of the meeting to declare that the Scheme has failed in view of the fact that debenture holders holding more than one-fourth in value of debenture have opposed the Scheme. In view of the provisions contained in Section 391 (2) of the Act, the Scheme of Arrangement / Compromise is required to be approved by a majority in number representing three-fourth in value of creditors present and voting at the meeting. The applicant and the other three institutions which in aggregate held 45% (in terms of

value who were present in the meeting) in value of the debentures opposed the Scheme. However, the Chairman of the meeting realising that the Scheme will not get through adjourned the meeting to 23.12.2004. For the last more than one and half year, the meetings are being adjourned from time to time and the same is causing great prejudice to the applicant and other three institutions. Even the meeting held on 23.12.2004 was also adjourned to 23.02.2005 despite the fact that the present application is pending before this Court.

9. Mr. Pahwa has further submitted that considering the majority of the applicant and the other three institutions, who even opposed the move for adjournment, it was not open for the Chairman to adjourn the meeting. The action of the Chairman of the meeting clearly suggests a strong bias in favour of the Company and against the interest of the applicant and other similarly placed institutions. The holding of other debenture holders comprising part of the class of debenture holders holding more than 2000 debenture holders is not sufficient to get the Scheme sanctioned in the meeting and hence, there is no need to permit any further meeting to be held by the Company for the purpose of considering the Scheme.

10. Mr. Pahwa has further submitted that the Scheme as proposed by the Company is not acceptable to the applicant and other three institutions on various grounds which are already enumerated in the written objections submitted before the Chairman of the meeting. The Scheme is also opposed by the applicant, in particular, in view of the fact that the Scheme is contrary to the statutory guidelines issued by the Reserve Bank of India to non-banking financial Companies. The applicant being a non-banking financial Company is amenable to the guidelines issued by the Reserve Bank of India and it is, therefore, not open for the applicant to deviate from the said guidelines as they are mandatory in nature. Considering the totality of circumstances and in particular the fact that the institutions holding more than about 45% in value of votes are opposed to the Scheme proposed by the Company, no fruitful purpose would be achieved in permitting the Company to hold and convene any further meeting of the debenture holders of the class holding more than 2000 debentures. He has, therefore, submitted that relief prayed for in the present Judge's Summons is required to be granted.

7. In support of his submission that when it is apparent that the requisite majority is not in favour of

sanctioning the Scheme, the Court should not grant permission to the Company to convene the meeting, Mr. Pahwa has relied on the decision of this Court in the case of KRISHNAKUMAR MILLS CO. LTD. (IN LIQUIDATION), IN RE., 45 COMPANY CASES 248 wherein the Court has taken the view that the main consideration was that the two secured creditors representing more than half the interest in total value of the secured creditors had opposed the Scheme. Therefore, the Scheme would not be able to be passed by the majority of the creditors of the secured class representing more than 3/4th value. Therefore, no meeting could be called as prayed for.

8. Mr. Pahwa has further relied on the decision of the Delhi High Court in the case of KOMAL PLASTIC INDUSTRIES V/S. ROXY ENTERPRISES PVT. LTD., 72 COMPANY CASES 61 wherein it is held that the provisions of Section 391 (2) of the Companies Act, 1956, are clear and unambiguous. The Company Court has no jurisdiction to sanction a Scheme if it is not approved by 3/4th majority of the creditors or each class of creditors. The question of the Court considering the sanctioning of the Scheme would arise only if the Scheme has been approved by the statutory majority provided for under Section 391 (2). Where separate meetings are called to consider one composite Scheme covering both secured and unsecured creditors, it is necessary that both the meetings should pass the Scheme by 3/4th majority. If the secured creditors, on the first meeting, reject the Scheme, the Scheme has to be deemed to have been rejected by the Creditors generally and cannot be considered for sanctioning by the Court. It is not even binding on the unsecured creditors even if they might have voted by a majority in favour of the Scheme. The Court has accordingly held that since the State Bank of India was the only Secured Creditor of the Company and was opposed to the Scheme of Arrangement propounded under Section 391, this amounted to opposition of the Scheme by 100% of the class of secured creditors. The scheme propounded was a composite scheme covering both secured and unsecured creditors and in view of the stand of the State Bank of India, no useful purpose would be served by directing the convening of meetings to consider the Scheme. The applications filed under Section 391 were liable to be dismissed.

9. Mr. Pahwa in support of his submission that the directions with regard to convening the meeting were issued by this Court ex-parte and since the meeting is not convened and it was being adjourned from time to time, the applicant can certainly approach this Court for

vacation and/or modification of the order passed by this Court, has relied on the decision of the Bombay High Court in the case of SAKAMARI STEEL & ALLOYS LIMITED (In Re.), 51 COMPANY CASES 266 wherein it is held that Rule 67 of the Companies (Court) Rules, 1959, says that an application under Section 391 (1) of the Companies Act, 1956, for directions is to be moved ex-parte. Hearing a motion ex-parte does not mean that the Court has not to apply its mind or be prima facie satisfied about the merits of the application. The language of Section 391 (1) is manifestly clear about the discretion resting with the Court in granting an application. Rule 69 is equally clear and points out that the directions are to be given "unless he (the judge) thinks fit for any reason to dismiss the Summons (for directions)". Thus, on the basis of the Act and the Rules made thereunder, it is not compulsory for the Court to give directions to convene a meeting contemplated under Section 391 (1). The Court has to consider the circumstances before giving its approval, though the fact that 3/4th in value of the creditors have agreed to accept the Scheme would be a strong circumstances in favour of sanctioning the Scheme by the Court.

10. Mr. Pahwa has further relied on the decision of the Hon'ble Supreme Court in the case of MIHEER H. MAFATLAL V/S. MAFATLAL INDUSTRIES LTD., 87 COMPANY CASES 792 wherein, while laying down broad contours of the jurisdiction of the Company Court, it is inter alia observed that the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bonafide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent. It is further observed by the Court that the proposed Scheme of Compromise and Arrangement is not found to be violative of any provisions of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

11. Based on this decision, Mr. Pahwa has submitted that by not putting the Scheme to vote and by getting the meetings adjourned, the Company as well as other Term Lenders are coercing the applicant and other three institutes in order to promote their own interest of settling their disputes on the line of CDR Package, the

copy of which was never supplied to the applicant. The Court should pierce the veil and come to the conclusion that the meetings are adjourned only with a view to get the requisite majority by hook or crook or by pressurising the applicant and other institutes to fall in line with their offers. He has, therefore, submitted that the Court should reject the application for convening the meeting as it becomes apparent now that the respondent Company has failed to have the approval of the requisite majority to the Scheme. Alternatively, Mr. Pahwa has submitted that the Chairman of the meeting should be directed to put the Scheme to vote in the forth coming meeting which is scheduled to be held on 23.02.2005.

12. Mr. Pranav G. Desai, learned advocate appearing for UTI Asset Management Company Private Limited, LIC Mutual Fund and G I C Asset Management Company Limited, respondent Nos. 2,3, & 4 herein have supported the submissions and the arguments made by Mr. Pahwa. He has submitted that there are in all 11 meetings held for considering the Scheme and all these meetings were adjourned. Despite specific objections raised by these institutes, the Scheme was not put to vote and instead thereof, the meetings were adjourned by simple majority. Mr. Desai has furnished the details of adjournments of meetings which are as under :-

04.04.2003 :- This Court ordered to hold meeting on 06.05.2003.

06.05.2003 :- Adjourned to 14.06.2003.

14.06.2003 :- Adjourned to 14.08.2003.

14.08.2003 :- Adjourned to 11.09.2003.

11.09.2003 :- Adjourned to 15.11.2003.

15.11.2003 :- Adjourned to 16.01.2004.

16.01.2004 :- Adjourned to 15.04.2004.

15.04.2004 :- Adjourned to 24.06.2004.

24.06.2004 :- Adjourned to 26.08.2004.

26.08.2004 :- Adjourned to 26.10.2004.

26.10.2004 :- Adjourned to 23.12.2004.

23.12.2004 :- Adjourned to 23.02.2005.

13. Mr. Desai has further submitted that if the respondent Company is not in a position to get through the Scheme, it should frame the new Scheme and seek the permission of this Court for convening the meeting to consider that new Scheme. The present scheme for which the permission is granted by this Court is pending for the period of more than one year and 10 months and 11 times the meetings were adjourned. The Court should not, therefore, permit the respondent Company or the Chairman of the meeting appointed by this Court to hold the meeting for consideration of the Scheme which is opposed by the applicants and three other institutes holding more than 25% in value of the total votes of debenture holders having more than 2000 debentures.

14. Mr. M.J. Thakore, learned Senior advocate appearing for the respondent Company has submitted that the Company has framed four Schemes for different class of debenture holders. Out of these four Schemes, three Schemes have already been approved by the debenture holders and sanctioned by this Court. So far as the present Scheme is concerned, he has submitted that except for the meetings held on 06.05.2003, 14.06.2003 and 26.10.2004, all the remaining eight meetings were adjourned unanimously. Some of the debenture holders holding more than 2000 debentures are Banks and Financial institutions. The meetings were adjourned for the reasons that debenture holders who are Banks and Financial Institutions were also independently deciding the Scheme proceedings considering the Arrangement / Compromise proposed by the Company under the Scheme or otherwise and were urging the Chairman of the meeting to postpone the meeting to enable debenture holders to have a workable scheme in place. He has, therefore, submitted that there is no delay on the part of the Company. On the contrary, debenture holders themselves had opted to get meetings adjourned. So far as the meeting held on 26.10.2004 is concerned, Mr. Thakore has submitted that during the course of the meeting, the Chairman asked the Company Secretary of the Company about the status of the Company's Corporate Debt Restructuring proposal being considered by the Empowered Group of Corporate Debt Restructuring (CDR) cell of lenders. The Chairman was informed that the Empowered Group of Corporate Debt Restructuring (CDR) cell of lenders met on 28.09.2004 confirming the approval given and stating that the detailed terms and conditions will be issued in due course. The Chairman was further informed that the Company was hopeful of receiving the said detailed terms

and conditions within a fortnight and thereafter the Scheme would be modified suitably. Keeping this in mind, the adjournment motion was moved by ICICI Bank Limited which was duly seconded by the State Bank of India. Though the applicant and other three institutes have opposed the adjournment motion, the same was carried by majority. Mr. Thakore has further submitted that so far as the meeting held on 23.12.2004 is concerned, in the said meeting the representatives of debenture trustees requested the representatives of the debenture holders, namely, Unit Trust of India, GIC Mutual Fund, LIC Mutual Fund and the applicant that a meeting to be held to discuss about submission of a reasonable proposal to the Company to modify the present Scheme which in turn can be referred to their lenders for their consideration. The representatives of the said debenture holders agreed to hold a meeting with the debenture trustees and discussed in the second week of January 2005. Accordingly, the debenture trustees vide their letter dated 13.12.2004 intimated to the said debenture holders about convening a meeting on 07.01.2005. The debenture trustees vide their letter dated 08.01.2005 informed the Company that the meeting was held as scheduled and the representatives of UTI, LIC Mutual Fund, the applicant and GIC Mutual Fund attended the said meeting and deliberated the issue of giving their proposal to the Company. The meeting was thereafter convened by debenture trustees on 13.01.2005. All the participants were informed about the present status of the Refinery Project, CDR Package etc. It was further conveyed to them that since the Company has no cash flaw, any modification in the Scheme would require approval of lenders. The CDR Package envisaged additional funds of approximately Rs.1500 Crores which would be disbursed by the existing lenders in phased manner. It was further pointed out that the Company would raise additional funds of approximately Rs.1900 Crores from new lenders after start up of Refinery Project. Two years time was likely to be taken for its completion. In the said meeting, the proposal was also made by GIC Mutual Fund demanding immediate repayment of 100% principal and suggesting the negotiation for interest payment. LIC Mutual Fund desired one time settlement of 100% principal along with 75% interest. UTI demanded one time settlement, up front payment in line with LIC Mutual Fund and the applicant demanded immediate payment of 100% and 75% interest (simple) and balance 25% interest by way of equity.

15. Mr. Thakore has further submitted that the company's representative has informed the representatives of these institutes that the Company does not have cash

flow for next two years till the start of Refinery project and any modification in existing Scheme will require consent of lenders and hence, the Company will communicate the said proposal of the debenture holders to the lenders and seek their approval. The Company informed the representatives about the proposal made by the Company with regard to Scheme to Small Debenture Holders for repayment of full principal and interest in six years, which has been sanctioned by this Court and on such lines, put forth broadly its proposal of repayment in installments of both principal 100% and simple interest in six years with moratorium of 2 years, subject to approval of the lenders. However, the said proposal was declined by the representatives of the applicant and other three institutions.

16. Mr. Thakore has further submitted that the applicant and other three institutions have for the first time put up their proposal on 13.01.2005 which was forwarded to ICICI Bank Limited being the leader of the lenders vide Company's letter dated 31.01.2005 and the ICICI Bank has replied vide its letter dated 01.02.2005 requesting the Company to persuade the debenture holders to accept the proposal for modification in line with Corporate Debt Restructuring (CDR). ICICI Bank Limited has, however, assured to place the proposal put forward by the debenture holders at the next Lenders Monitoring Committee Meeting for discussion and consideration. He has, therefore, submitted that it may not be proper to conclude anything at this stage and proposals are open for deliberation and discussion. To proceed further on the basis of any conclusion as claimed by the applicant would hamper the implementation of the refinery project which was restarted in full swing with lot of new money having been brought into the project by the lenders and it may derail the project which may not be in any manner whatsoever in the interest of the applicant or other three institutes who are merely second charge holders.

17. Mr. Thakore has further placed certain statements on record showing that the total loans taken by the Company upto 30.09.2004 from not less than 23 lenders are to the tune of Rs. 2976.43 Crores. The interest outstanding thereon comes to Rs. 3075.35 Crores and the total outstanding is to the tune of Rs. 6051.78 Crores. Thus, lenders are sacrificing rate of interest to be reduced from 18% to 12.50%. Over due interest / Liquidated damages are waived. Repayment of Principal amount postponed to 2011 - 2017. Repayment of interest Outstanding postponed to 2026. Funding of interest till 30 Sept. 2007 and new loans to be raised for the

Project. He has also furnished a statement of fresh funds infusion by the Existing Lenders and Fresh Funds arranged by the Promoters. As per this statement, the fresh funds to be infused by the existing Lenders are to the tune of Rs. 955 Crores out of which Rs. 820.30 Crores are already disbursed in January, 2005. The fresh funds arranged by the Promoters are to the tune of Rs.1693 Crores and amount already brought is to the tune of Rs. 897 Crores. These amounts disbursed and brought in are being utilised for import of capital equipment including plant and machinery and related project expenses so as to complete the refinery by January 2007. Mr. Thakore has also produced a statement showing principal and interest outstanding of Debenture holders. As per this statement, the principal amount invested by the debenture holders is to the tune of Rs. 568 Crores, interest accrued thereon is Rs. 263 Crores and the total is to the tune of Rs. 831 Crores. Out of this amount, the applicant as well as other three institutes have invested Rs. 137 Crores and the interest accrued thereon comes to Rs. 98 Crores and the total is to the tune of Rs. 235 Crores. This Court has sanctioned a Scheme on 07.10.2004 for Small Debenture Holders (about 3 Lacs in numbers) having interest payment in three installments before 31.12.2005 and repayment of Principal amount in 4 installments before December 2009. The applicant and other three institutes have demanded repayment of principal amount of Rs. 137 Crores and 75% of interest i.e. Rs. 75 Crores totalling to Rs. 212 Crores immediately. For this, the Company has to raise further Priority Loans of Rs. 212 Crores immediately as there is no cashflow available with the Company prior to commencement of commercial production. The Company has to offer a similar treatment to small debenture holders, entailing a need of raising about further Rs. 300 Crores immediately. As against this, the lenders are insisting for the Company raising the loans firstly to complete the Refinery Project (Rs. 2000 Crore approx.) prior to further borrowings for other purposes. The existing outstandings of the applicant and other three institutes (Rs. 235 Crores) constitutes 3.5% of the existing loans i.e. Rs. 6610 Crores and 3.1% of the existing loans plus new sanctioned loans by existing lenders i.e. Rs. 7605 Crores.

18. With regard to the current status of the Refinery project of the Company, Mr. Thakore has submitted that the capacity of the Refinery is 10.5 Million Metric Tonnes p.a.. The Project cost is Rs. 13,000/- Crores and 2/3rd of the Project is almost completed. The Company has already spent about Rs. 8,000/- Crores on

this project. The Project was on a standstill since March, 1999 and now re-commencement of physical construction at site has already been started. The current workforce mobilised on site is about 3000 persons, expected to peak at about 15,000 people in next three months. The expected date of commissioning of the refinery is January 2007 and any further delay in commissioning of the project beyond January 2007 would result in huge cost escalations about Rs. 2 Crores for each day of the delay seriously impacting the project viability. He has, therefore, submitted that the reliefs prayed for by the present applicant as well as other three institutes should not be granted by this Court looking to the over all scenario of the Project.

19. With regard to the adjournment of the meetings and approval of the motion of adjournment by simple majority, Mr. Thakore has submitted that this Court while passing the order on 04.04.2003 has appointed the Chairman and authorised him to exercise all powers under the Articles of Association of the applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meeting including an adjournment to the Scheme of Resolution, if any, proposed at the meeting by any persons and to ascertain the decision of the meeting on a poll. Article 63 of the Articles of Association states that the Chairman may, with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting, adjourn the meeting from time to time and from place to place. It further states that no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. He has further submitted that in Horsley's Meetings Procedure, Law and Practice (Second Edition) by W. John Taggart, under Chapter Ten on Adjournment, in head note [1006], it is observed that "Under the common law a meeting is deemed to be invested with the right to adjourn its proceedings at its own discretion: Stoughton V/s. Reynolds [1736] Fortes Rep 168. A meeting has an inherent power to adjourn where it is not possible to transact all the business without adjourning; Kerr V. Wilkie (1860) 6 Jur. NS 383. Accordingly, a power of decision to adjourn lies with the meeting itself, i.e. the majority of those present is able to pass a resolution to adjourn the meeting or to defeat a motion to adjourn. He has further relied on the observation made on page 102 of the said book which says that a Chairman must accept a motion to adjourn the meeting if it is seconded. This is the general view of those authorities to express an opinion about this, based on preliminary procedure.

20. Mr. Thakore has further relied on the observations made by Dr. K.R. Chandratre in his book, namely, Company Meetings Law, Practice & Procedure. On page 225 wherein it is stated that "When a meeting is sought to be adjourned, a motion to that effect must be moved. It may be moved by the Chairman of the meeting or any member present at the meeting. It is usually seconded though that is not necessary; even if it is not seconded by any member, it is advisable to put the motion to vote. The motion must clearly state the next date, time and place of the meeting. Voting on this motion is taken in the first instance by a show of hands (except where articles of association of the company do not permit it). If a poll is demanded on the motion, it must be taken "forthwith" i.e. immediately after it is demanded. If the motion secures a simple majority, it will be passed as an ordinary resolution and the Chairman will declare the result and the date, time and place of the adjourned meeting. If the motion to adjourn is passed by a simple majority of votes, it becomes a decision of the meeting and accordingly the meeting stands adjourned.

21. Mr. Thakore further relied on the observations made by B.K. Sen Gupta in his book "Company Meetings Law & Procedure" in Chapter 9 on adjournment, it is stated that a valid adjournment can be effected by several ways. It is inter alia observed that the decision in Salisbury Gold Mining Co. V/s. Hathorn [1897] AC 268 lays down no general principle beyond recognising that the common law right of the majority of an assembling body to adjourn its proceedings may be limited or excluded by the specific regulations governing that body. The provisions of Regulation 53 (1) of Table A are similar to the Article in the Salisbury Gold Minings case. But there is one crucial difference: the article did not include the words "and shall if so directed by the meeting". If the article of a Company is in terms similar to Reg. 53(1) of Table A - (a) the Chairman may only adjourn if the majority do not oppose the adjournment; (b) the Chairman has no discretion in the matter if a majority of the meeting require him to declare an adjournment.

22. Based on this observation, Mr. Thakore has submitted that once the majority of the meeting desires to have the meeting adjourned, the Chairman has no discretion in the matter and the Chairman cannot accept the demand of the applicant or other three institutes to put the Scheme to vote.

23. Mr. Thakore has further relied on the observation made by M.C. Bhandari in his Book "Guide to Company Law Procedures" under Topic 89 which deals with adjournment of a Board or a General meeting. It is stated that in the case where there is a quorum, take decision in the Board meeting or the General Meeting, as the case may be, to adjourn either in the beginning or at any stage by majority of votes, unless otherwise provided in the Articles of Association in this regard.

24. Lastly, Mr. Thakore relied on the observations made by A. Ramaiya in his book Guide to the Companies Act. On page 4114 of the said book, it is observed by the learned author that the right to adjourn is inherent in a meeting, whether or not there is a Chairman of the meeting. If there is no provision in the Article for adjournment, the members may adjourn the meeting by passing an ordinary resolution to that effect.

25. Based on the aforesaid views, Mr. Thakore has submitted that there is no substance in the arguments put forward by the applicant and other three institutes that the meetings cannot be adjourned by the simple majority and since the meeting is having inherent right to adjourn the meeting, there would not be any objection if the meetings are adjourned for certain valid purposes.

26. Mr. Thakore has further submitted that in view of the decision of the Hon'ble Supreme Court in the case of RAINBOW DENIM LTD. V/S. RAMA PETROCHEMICALS LTD., 116 COMPANY CASES 640, the decisions relied on by the learned advocate of the applicant are not a good law. The Hon'ble Supreme Court has held in this case that the appropriate time for the Company Judge to consider the scheme was subsequent to approval thereof by the shareholders and creditors of the appellant company. Therefore, the order of the learned Company Judge and the order under appeal must be set aside and liberty given to the appellant - Company to move the High Court for directions for calling meetings of its shareholders and creditors for the purposes of considering and approving the scheme. Once that has been done, a further application will be required to be made before the learned Company Judge. That would be the appropriate time for the learned Company Judge to consider the same. Mr. Thakore has, therefore, submitted that the meeting has still not considered the Scheme and it is neither approved nor rejected by the meeting. This Court, therefore, should not interfere at this stage in the proceedings which are still pending before the meeting.

27. Mr. Thakore has further relied on the decision of this Court in the case of GUJARAT KAMDAR SAHAKARI MANDAL AND OTHERS V/S. RAMKRISHNA MILLS LTD., 92 I.T.R. 692 wherein the Court has observed that merely because the secured creditors oppose the scheme, the application could not be rejected. The avenue for negotiation and discussion had to be kept open. The Court has further observed that a Scheme proposed may be open to criticism, may be one which is not acceptable to the class of secured creditors, but unless it is effectively shown to be unfair and unjust and is thrown out unanimously or by majority as absolutely unworkable, unreasonable and irrational, it would be wrong to shut out the scheme at the threshold by rejecting it on the ground that the secured creditors have taken a rather stubborn and adamant attitude towards the working of the scheme, and on the ground that in the absence of favourable response from the majority of the secured creditors initially, meetings of the concerned interests cannot be convened.

28. Mr. Thakore has further relied on the division Bench Judgment of this Court in the case of MAFATLAL INDUSTRIES LIMITED, IN RE., 87 COMPANY CASES 705 wherein it is held that under Section 391 (1) read with Rule 69 of the Company (Court) Rules, 1959, what is to be done at the first stage is only an application is to be moved under Section 391 for the purpose of securing an order for convening the meetings of shareholders or creditors or a class of them, as the case may be, at that stage the Court is not called upon to apply its mind about sanctioning of the Scheme. That stage arises only when the Scheme is approved by requisite majority in terms of Section 391 (2). It is only after approval is accorded by the requisite majority under Section 391 (2) that the question is required to be gone into whether it is to be sanctioned by the Court. Therefore, the stage for beginning the Scheme comes into existence only when the Scheme is approved by the meeting convened in terms of order passed by the Court on an application under Section 391 (1) and it is at that stage, the question of disclosure of material facts relating to the Company as required under the Proviso to Section 391 (2) would arise and not before.

29. In view of the aforesaid legal as well as factual submissions, Mr. Thakore has strongly urged that the present application does not deserve for any indulgence by this Court and it is straightway to be rejected.

30. Mr. Mihir H. Joshi, learned Senior advocate appearing with learned advocate Ms. Megha Jani for ICICI

Bank Limited has submitted that ICICI Bank Limited is the prime lender and huge investment is made by the Bank in the respondent Company. The ICICI Bank Limited being the leader is hoping the possibility of arriving at the agreed formula and it is in the interest of everyone to see that the Project to be commissioned immediately and for that purpose, almost all lenders have agreed to invest more funds and also made sacrifices in terms of deferment of the principal amount and reduction of interest etc. He has, therefore, submitted that the applicant as well as other three institutes should not have insisted for immediate payment which would adversely hamper the prospects of the project being commissioned. The lenders Monitoring Cell is considering the proposal put forward by the applicant as well as other three institutes and the decision would be taken very shortly. The Court should not, therefore, give any direction with regard to putting the Scheme to vote or finalising the Scheme despite the request that may be made for adjournment of the meetings. He has made it very clear that ICICI Bank being the prime lender, is in no way, interested in abrupt conclusion of the meetings. Looking to the size of the project and the huge investment made by the term lenders, Banks and Financial institutions, the Company should be given some time so as to come out of the present state of affairs and the Project may be started within the expected period.

31. After having heard the learned advocates appearing for the respective parties and after having considered their respective pleadings, statutory provisions, experts-made precedents, prevailing practice and case-law on the subject, the Court found that the real questions which are posed before the Court for its decision are whether meeting of the Debenture Holders considering the Scheme of Compromise and Arrangement under Section 391 ordered to be held on 26.05.2003 is validly adjourned from time to time and whether such adjournment motion is legally and genuinely passed by simple majority especially when the Scheme is not likely to get through by requisite majority. These questions are relevant and assume much significance in the context of Court's powers to issue directions for convening the meetings under Section 391 (1) of the Act, role to be played at the meeting by the Chairman appointed by the Court, attempts made by the Sponsors or Supporters of the Scheme to delay the proceedings of the meetings and thereby thwart the demand of putting the Scheme to vote, made by Debenture holders having more than 25% of the total holdings of Debenture holders and at this stage Court's role to play.

32. As far as practice and procedure is concerned, there is no dispute about the proposition that meeting can be adjourned as may times as the majority of the members take such decision at the meeting. Neither any statutory provision nor any authority is shown to the Court which inspires the Court to take the view that such meeting can be adjourned by 3/4th majority only. It is also ably and convincingly demonstrated by Mr. Thakore, the learned Senior counsel appearing for the Company that when any motion for adjournment is moved at the meeting, the Chairman is bound to take up that motion first and no other business can be transacted at the meeting till such motion is defeated. The Court, therefore, does not normally find any fault with the Chairman adjourning the meeting on the basis of majority votes.

33. It, however, causes concern to the Court when someone approaches the Court raising the grievance that since the Scheme was not likely to get through, the same was intentionally not put to vote and under the guise of adjournment motion, the meeting was got adjourned from time to time. In such a situation, the Court cannot remain merely a silent spectator and allows the things to happen at the discretion of the Chairman of the meeting. The Court, then, undertakes the task of examining the facts and circumstances leading to such dispute, pierces the veil behind such frequent adjournments, calls upon the Chairman to explain as to why the Scheme which is being considered at the meeting is not put to vote and issue necessary directions for striking the balance between the parties. The Court is not powerless when any mischief is being played with the Court or its directions are misused, misinterpreted or misapplied to sub-serve one's own purpose.

34. Here in the present case, the Court has passed the order on 04.04.2003 directing to convene the meeting on 06.05.2003. The meeting was thereafter adjourned for 11 times and now it is scheduled to be held on 23.02.2005. 11 adjournments and one year and 10 months period are not such small things which can easily be ignored. As against this, there is also justification to some extent for such adjournments. Out of 11 adjournments, about 8 times the meeting was adjourned unanimously and without any protest. The present applicant has attended to the meeting only on 26.10.2004 and 23.12.2004. Thereafter, a joint meeting of the Company as well as the applicant and other three institutes along with the Western India Trustees & Excentor W. Limited was held on 13.01.2005. The

applicant and other three institutes have submitted their proposals. The Company has offered them the same proposal which was offered to Small Debenture holders and Scheme in respect of whom is duly sanctioned by this Court. The Company has already forwarded the proposals of the applicant and other three institutes to the ICICI Bank Limited being the leader of the lenders and the same are being considered at the next LMC Meeting. There is no possibility of arriving at any final decision prior to 23.02.2005, the date on which the Court convened meeting is scheduled to be held. The applicant and other three institutes, therefore, apprehend that the meeting to be held on 23.02.2005 is also likely to be adjourned to some other date. Whether the Court should interfere at this stage by exercising its inherent power of monitoring the Scheme proceeding and that too, while considering the size of the project, huge investment made by the term-lenders, Banks and Financial institutions, fresh funds infused and/or to be infused by them, funds arranged by the Company, Project being on the verge of completion and sacrifices made by term lenders, small Debenture Holders and others. Looking to these and other various factors which are canvassed during the course of arguments, the Court is not inclined to issue the direction to put the Scheme on vote at the meeting held on 23.02.2005 and leaves it to the discretion of the Chairman to conduct it in accordance with law.

35. The Court is, however, not in favour of the Scheme being postponed for indefinite period as the Company is protected by this Court by virtue of an order passed in Company Application No. 171 of 2003 filed by the Company under Section 391 (6) of the Act. The applicant and other three institutes, may either be persuaded to make sacrifice in the larger interest of the industry or their demand may be satisfied. Be that as it may, the Court is not much concerned about it, nor it falls within its jurisdiction to advise the parties to do this or not to do that. The Court, however, directs the Chairman of the meeting to be held on 23.02.2005 or on any other adjourned meeting to be held thereafter, but not later than 30.06.2005, to determine the sense of the members present in such meeting by putting the Scheme to vote and place his report before the Court within seven days from the conclusion of such meeting. The report containing the outcome of the Scheme in question must be placed before this Court on or before 07.07.2005.

36. Subject to the aforesaid directions and observations, the present application is accordingly disposed of without any order as to costs.

[K.A. PUJ, J.]

#Savariya#

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